County of San Diego

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DATE: July 29, 2011

TO: Jack Miller
Director, Department of Environmental Health

FROM: County of San Diego Solid Waste Local Enforcement Agency

SUBJECT: SUPPLEMENTAL STAFF REPORT
GREGORY CANYON LANDFILL SOLID WASTE FACILITY PERMIT

On May 13, 2011 you took actions required to send a proposed Solid Waste Facility Permit for the Gregory Canyon landfill to CalRecycle for concurrence or objection. On July 15, CalRecycle concurred in that permit.

State law requires you to issue a permit in which CalRecycle has concurred if you find that the permit is consistent with state solid waste facility laws and regulations. This memorandum supplements our May 11 2011 report to you, by summarizing and addressing developments since that date. We recommend that you find that this permit is consistent with state law, that you make certain additional determinations and findings related to developments since May 13, and that you issue this permit.

CalRecycle Concurrence

CalRecycle's concurrence in the proposed permit was informed by a CalRecycle Staff Report, attached at Tab A. That report took into account all comments received by CalRecycle.[1] It advised that the proposed permit complied with state law, and recommended concurrence. CalRecycle staff also recommended that the Acting Director adopt your CEQA findings and Statement of Overriding Consideration to the extent applicable to the matters subject to CalRecycle jurisdiction.

CalRecycle's action was recorded in a staff Request for Action that incorporated the Acting Director's Action. That document is attached at Tab B. The Acting Director followed staff's recommendations regarding concurrence and CEQA. However, the Acting Directly also stated:

> I note for the record that I do not agree with the staffs conclusion that there is no evidence of an environmental justice issue with respect to this site. Clearly, the RFEIR has established the project's unavoidable significant and cumulative impact on the Ethnohistory and Native American Interests of the Pala Indians. However, despite the fact that I recognize the existence of this issue, and that it was not fully mitigated in the CEQA process, it is not within the jurisdiction or authority of the Department to object to a proposed permit based upon this issue, and as a Responsible Agency under CEQA,

[1] No additional comments were received by CalRecycle following issuance of the CalRecycle Staff Report.

> our ability to add mitigations to a permit are limited to those matters within our authority, therefore, it cannot be a basis for my decision in this matter.

This statement in the Acting Directors Action statement was in response to the following conclusion in the Local Impacts section of the CalRecycle Staff Report:

> Staff has not identified any evidence of environmental justice issues related to this item. Staff finds the project and permit process to be consistent with Government Code Page 15 of 16 Section 65040.12, as there has been fair treatment of people of all races, cultures, and incomes with respect to the proposed action being recommended above.

The Acting Director's conclusion that there is evidence of an environmental justice issue for this project is not new information and does not suggest that any potentially significant impact of the project has been neglected, because the evidence called out by the Acting Director is the prior CEQA analysis of the project. Your May 13, 2011 actions included a determination that the impacts of this project on the Ethnohistory and Native American Interests of the Pala Indians—which is the environmental justice issue called out by the Acting Director--should be overridden by the benefits of the project. The decision document that staff will provide to you for issuance of the permit will reaffirm that conclusion.

Comments to CalRecycle

The LEA and CalRecycle staff have reviewed comments on the proposed permit provided to CalRecycle in writing and at CalRecycle's public hearing. In general those comments were similar to comments previously provided to the LEA which you previously considered. CalRecycle staff recommended concurrence in the proposed permit after considering those comments. However, CalRecycle's scope of review to concur or object to a proposed permit is narrower than your scope of authority to issue or not issue a permit, taking the LEA's duties as a CEQA Lead Agency and Section 44012 of the Public Resources Code into account. LEA staff therefore reviewed all comments submitted to CalRecycle for any new matter that could raise a significant issue either under CEQA or Division 30 of the Public Resources Code. We saw no obstacles to issuance of this permit in those comments. You may recall that prior comments from the LEA's Public Meeting were carefully considered by staff in the following topic areas: Environmental Impacts and Environmental Mitigation Generally, Threats to Ground Water and Surface Water / Post Closure Care, Green House Gas and Climate Change, County Water Authority Pipelines, Fire Protection Services, Regional Solid Waste Disposal Capacity Planning, Tribal Sacred Sites, Environmental Justice Issues other than Tribal Sacred Sites, and Traffic Safety.

Particular attention was given to written comments submitted to CalRecycle by Procopio, Cory, Hargreaves and Savitch LLP on behalf of the Pala Band. Those comments, bracketed and numbered to facilitate discussion, are attached at Tab C. Staff's analysis of those comments follows.

Response to Comment No. 1:

The description of the “Total Permitted Site” in the proposed Solid Waste Facility Permit was correct, as the 308-acre area represents the facility subject to regulation under the Integrated Waste Management Act (Act) and applicable portions of Cal. Code Regs. (CCR) Title 14 and Title 27.

The comment letter suggests a temporary storage yard should be added as part of the “Total Permitted Site”. However, that is not an activity that is regulated under the Act or its implementing regulations. A permit condition is included pursuant to the LEA’s authority as the CEQA lead agency but, that CEQA condition does not make the temporary construction yard subject to the Act and its implementing regulations.

Response to Comment No. 2:

This comment is based on incorrect facts.

The comment incorrectly cites a maximum depth of excavation within the landfill footprint of 525 feet above mean sea level (amsl) in the 2004 solid waste facility permit (SWFP), and then uses that incorrect fact to allege an inconsistency with the maximum depth of excavation of 380 feet amsl shown in the JTD and the 2011 SWFP.

The source for the 525 foot amsl figure is the 2004 SWFP, which includes a reference in section C.2.9.3.2 of the 2004 JTD (which is identical in the 2011 JTD) to a maximum bottom depth of excavation of 525 feet amsl for Phase II of the landfill. The JTD narrative concerning Phase I excavation did not include a specific amsl figure for lowest excavated depth; however, the JTD drawings, in both 2004 and 2011, show a lowest excavated elevation of 380 feet amsl. The lowest depth of excavation would be in Phase I, which is at the lower (north) end of the canyon.

Contrary to the allegations in this comment, other comments in this same letter made it clear that the commenter recognized that the 525 amsl figure in the 2004 SWFP did not refer to the lowest elevation for excavation. While Comment No. 2 refers to a 145-foot difference in lowest excavated elevation between the two permits (525 amsl vs. 380 amsl), Comment Nos. 3 and 4 refer to a difference in lowest excavated elevation of 20 feet. That 20-foot difference is between the maximum (lowest) excavated depth between the double liner alternative as described in the FEIR on the one hand (approximately 400 feet amsl) (FEIR, P. 6-76), and the 2011 (and 2004) JTD drawings and 2011 permit on the other hand (380 feet amsl).

The FEIR and the JTD do differ by approximately 20 feet (approximately 400 amsl vs. 380 amsl). The real point of the comment was to suggest that the required 5-foot separation to groundwater would not be maintained if the toe of the landfill was excavated to 380 feet amsl instead of approximately 400 feet amsl. That is not correct.

First, the comment misstates the regulations when it says there has to be a 5-foot separation between the piezometric surface and the "bottom of the proposed landfill". The required separation is between groundwater and waste. Nonetheless, the JTD, at p. C.2-6, noted that the bottom excavation grades are anticipated to be a minimum of five feet above the piezometric surface.

Further, the liner itself is more than 5 feet thick, without even considering the depth of the subdrain layer, and in and of itself provides the required 5-foot separation. This was reviewed and confirmed by both Bryan A. Stirrat & Associates (BAS) in work for the applicant and by URS Corporation (URS) in work for the LEA. The analyses are discussed in the BAS response to URS's JTD/EIR Comparison Table, at item 69, which has previously been submitted to LEA.

Second, and consistent with the JTD discussion noted above, the RFEIR stated that "the bedrock will be excavated no more than five feet above the highest anticipated groundwater elevation" (p. 3-1). The LEA may enforce this design parameter, as the RFEIR is identified as a document describing the operation of the facility in block 15 of the SWFP. If it is determined during final design and construction that excavation below approximately 400 feet amsl at the toe of the landfill would not be consistent with this requirement, the permit as a whole would not allow excavation to 380 feet amsl. Thus, because the excavation and not the waste must be five feet above the piezometric surface, both the permit and the design are conservative when compared to the regulatory requirement of a five foot separation between the piezometric surface and waste.

Third, the LEA reviewed the difference between a bottom excavation of 400 feet amsl and 380 feet amsl, and in the CEQA Project Findings, p. B-81 found that change to be inconsequential because the 5-foot separation requirement would be met or exceeded.

Lastly, and most importantly, this is an RWQCB issue. Public Resources Code Section 43101(c)(2) mandates that the “state water board and the regional water boards are the sole agencies regulating the disposal of solid waste for the purpose of protecting the waters of the state.” In addition, 27 CCR Section 21650(i) mandates that the “proposed solid waste facilities permit shall not contain conditions pertaining solely to air or water quality.”

Response to Comment No. 3:

This comment asserts that a change in the design of the project results in stability concerns, but it, too, is based on incorrect facts. The comment asserts that the redesign results in an 300 foot increase in the rise along the bottom elevation of the landfill excavation, to 540 feet.[2] In essence, the commenter is claiming that the slope is steeper, and more prone to failure in a seismic event. However, that is incorrect.

The comment errs by comparing the lowest *bottom* excavation (380 feet amsl) with the highest *side* excavation at the uppermost perimeter of the landfill(925 feel amsl). However the stability analysis looks at the particular liner, and for the bottom liner the stability analysis would consider the slope of the bottom excavation. The highest bottom excavation was indicated at approximately 700 feet amsl for the double liner alternative in FEIR (FEIR, p. 6-76) and 750 feet amsl in the JTD (JTD, Figure 12; Appendix B-2, P. 2).

[2] The comment only attributes 20 feet of this change to deeper excavation at the bottom of the landfill, indicating the commenter’s recognition that the 525 foot amsl figure it used as the basis for its assertions in Comment No. 2 was incorrect.

Initially, and for the reasons stated in the response to Comment No. 2, this is a RWQCB issue and not a proper subject for a SWFP.

Nonetheless, the slope stability analysis that has been done is applicable and adequate. The stability analysis (located in Appendix C of the JTD) of the the refuse slopes (e.g. bottom liner) determined that that stability was adequate and would meet the factor of safety of 1.5. The analysis of refuse slopes was based on the bottom excavations described in the JTD, i.e., 380 feet amsl at the toe and 750 feet amsl at the southern end, and so is exactly the same as the landfill excavation described in the JTD drawings. To be conservative, the stability analysis of the refuse slopes was based on the weakest element of the bottom liner system, which is the interface between the non-woven geotextile and the HDPE membrane. While not directly raised in the comment, Appendix C also concluded that the factor of safety would be met for the cut slopes (e.g. side liner). The weakest element of the side liner system is also the interface between the non-woven geotextile and the HDPE membrane.

Response to Comment No. 4:

This comment is again based on incorrect facts. The January 2011 JTD included a revised and detailed analysis of the availability of cover material (JTD, Section B.4.4.8). URS peer reviewed that analysis and determined that adequate material existed. This item was included in the URS EIR/JTD comparison table, as Item #35 and Item #36. This was addressed by BAS in its responses to URS' comments, which was submitted to LEA by the applicant and considered when LEA made its complete and correct determination.

The claim made in this comment arises from a misreading of the table attached to Appendix C-2 of the JTD. The reference to 9.8 mcy for the proposed project is under the line item entitled "final cover and excavation materials." Thus, the line item referred to the materials that might be suitable for final cover, not the overall mass excavation quantity. The comment also relies on a discussion in the FEIR that the mass excavation for the double liner alternative is 3.5 mcy less than the proposed project, but fails to disclose that on the same page of the FEIR (p. 6-76), it is stated "the quantity of excavated rock and soil material would be about 7.93 million cubic yards (mcy)." The FEIR is exactly consistent with the JTD, which states the mass excavation quantity as 7.9 mcy. This discussion in the FEIR was not challenged in the prior CEQA litigation.

Response to Comment No. 5:

This comment is a repackaging of allegations that were rejected by CalRecycle in the appeal from LEA's complete and correct determination.

The argument that final arrangements for fire protection must be completed prior to permit issuance was previously addressed in the appeal. LEA correctly pointed out that a permit condition requiring final arrangements for fire protection was adequate, since any fire danger related to the construction, operation and closure of the landfill would not occur until the commencement of construction.

As before, the thrust of the comment goes to wild fires, which goes beyond the requirements for the SWFP application and the SWFP (see 27 CCR Section 21600(b)(8)(B)). This time, however, the comment attempts to attack the detail of the "will serve" letter provided to the applicant by the County

Fire Authority. In order to receive fire service, the applicant is required to commit to fund the future development of fire protection services through a Community Facility District or a Developer Agreement. That commitment would be made to the County Fire Authority, prior to initiating construction (proposed SWFP, Condition 17.i). There is no ambiguity.

Moreover, that timing does not mean that fire protection capability would not exist prior to completion of the County Fire Authority facility. The JTD, at p. B.5-41, discussed additional fire protection capabilities through the San Diego County Fire Authority, the North County Fire Protection District, and the Pala Reservation fire station. The JTD also noted that the fire protection authorities are parties to reciprocal aid agreements, meaning that the closest fire stations would provide the initial response to a wildfire (JTD, p. B.5-41 – B.5-42).

Finally, the discussion of compliance with flammable clearing requirements was properly included as Finding 13.e, and not as a permit condition, since compliance measures were discussed in Section B.5.3.5 of the JTD.

Response to Comment No. 6:

This comment makes the broad assertion that any material other than municipal solid waste is "designated waste," but fails to recognize or even acknowledge the definition of "designated waste" provided in Water Code Section 13173. In order to be a designated waste, a material has to be one of two things: 1) hazardous waste that has been granted a variance from hazardous waste management regulations, or 2) nonhazardous waste that "contains a pollutant that under ambient environmental conditions could be released in concentrations exceeding applicable water quality objectives or that could reasonably be expected to affect beneficial uses . . ."

The determination of whether any of the waste categories identified in Form E-177 would comprise "designated waste" is made on a case-by-case basis. Moreover, that determination is made by the RWQCB. Public Resources Code Section 43101(c)(1) provides that the state water board or the regional water boards are the sole agencies "regulating . . . the classification of waste."

Response to Comment No. 7:

This comment is likely based on the difference between the listing of documents in the 2004 SWFP and this proposed SWFP. One major reason the proposed SWFP lists fewer documents than the 2004 SWFP in block 15 is that CalRecycle changed the permit form. The old form called for a list of documents that "describe and condition" the facility. The new form calls only for documents that "describe." So major descriptive documents were listed, including pending WDRs that included descriptive material.

If any other permits had been issued or were available in a citable draft form, they would have been listed, but there were no other permits pending or in place at the time (or now) that could have been listed in block 15 as descriptive of this project. The listing of documents in block 15 was adequate.

Response to Comment No. 8 through Comment No. 15:

These comments share a common theme of attacking specific conditions in the proposed SWFP on the alleged basis of their being improper or ambiguous. Because each of these allegations is procedurally related, they will be addressed collectively in this response.

In effect, these comments represent nothing more than the commenter's disagreement with LEA over the need for, or the precise language of, the permit conditions. However, this is a matter that falls within the expert regulatory judgment of LEA as the agency issuing and administering the SWFP.

The matter of LEA's expert regulatory judgment was addressed in the appeal from LEA's complete and correct determination. LEA asserted that as the expert agency reviewing the permit application, its expert regulatory judgment was entitled to considerable deference.[3] In his Decision, the Acting Director of CalRecycle agreed. First, the Decision noted the general rule that courts defer to administrative agencies when they interpret the meaning of statutes and regulations within their purview, and found that general rule particularly relevant when applied to the actions of LEA. Second, CalRecycle acknowledged that LEA was the "actual arbiter of whether it had sufficient information to commence its review [of the permit application]." This principle applies equally to the permit conditions, as LEA is the expert agency administering and enforcing the permit. Its expert regulatory judgment as to the number and type of conditions, and the precise wording of the conditions, is entitled to deference.

In addition to the above procedural discussion, this response will include a brief substantive discussion of a few of the specific assertions, where warranted.

In response to Comment No. 9, in the event of changes to the project, such as a change in operating hours or a change in mitigation measures, nothing in the SWFP would limit the general applicability of CEQA and other applicable provisions of law. It is not necessary that the SWFP expressly identify any and all potentially applicable provisions of law.

Comment No. 12 alleges that the permit application does not include the MMRP and project design features for the project. However, those are fully and completely set out in Attachment 3 to the SWFP application, and made enforceable through the SWFP.

Comment No. 14 claims that the MM 4.5-5 is illusory, but fails to mention that the adequacy of this mitigation measure was never challenged in the prior CEQA litigation. MM 4.5-5 simply recognizes that CalTrans is responsible for carrying out projects to improve state and federal highways. The applicant made a funding commitment, and the LEA made that commitment enforceable through the SWFP. Nothing more is required.

Comment No. 15 makes the same assertion with respect to the applicant's commitment to fund traffic safety improvements on SR 76 as provided in Condition 17.l of the SWFP. The applicant made that commitment even though no significant impact on traffic safety was found in the EIR. The

[3] In particular, the "likelihood of compliance" determination in 27 CCR Section 21570(d) would by necessity require the exercise of LEA's expert regulatory judgment. See also 27 CCR Section 21650(a): "The EA shall examine the application package to determine whether it meets the requirements of §21570."

determination of no significant impact on traffic safety was not challenged in the prior CEQA litigation. And, once again, CalTrans is responsible for carrying out this project on a state highway. The applicant has made a funding commitment, the LEA made that commitment enforceable through the SWFP.

Response to Comment No. 16:

Even though unsuccessful on this exact issue in the appeal challenging LEA's complete and correct determination, this comment asserts that matters related to land use should be incorporated in the JTD and the SWFP. However, off-site road improvements are not an element required for a permit application, nor required to be included in the SWFP. 27 CCR 21600(b)(8)(I) indicates that the permit application is only required to include a "traffic control plan, showing that the traffic flow into, on, and out of the site is controlled to minimize interference and safety problems for traffic on-site and adjacent public streets or roads." The comment does not assert that this requirement was not met.

Nonetheless, all mitigation measures arising out of Proposition C, including these road improvements, are enforceable through the SWFP. Finally, the design drawings for the SR 76 improvements have been submitted to CalTrans. LEA requested verification from the applicant that this filing had been made, and this was provided.

Response to Comment No. 17:

The comment reads far too much into Proposition C, which does not place any substantive prohibitions on the source of waste streams that may be received at the landfill.

In any event, this issue was addressed in some detail during the CEQA process. Response to Comment 3P.011 of the 2003 Draft EIR stated: "Section 2K of Proposition C states: 'The voters hereby reaffirm the policy of the County of San Diego that each sub-region of the County be responsible for providing sufficient solid waste facilities to handle the solid waste generated in each sub-region and solid waste shall not be shipped from one sub-region to any other sub-region except where an emergency exists.' While this language states a reaffirmation of a County policy, no existing, written policy has been found. The language does not prohibit citizens of the County from disposing of waste at any facility, even those outside the County."

The commenter fails to disclose that this prior analysis and conclusion, and the lack of any waste shed restrictions, was not challenged in the prior CEQA litigation. As a result, this is a land use matter which is both final and binding, and outside of the scope of authority under the Act.

Response to Comment No. 18:

This comment asserts that as a CEQA Responsible Agency, CalRecycle is required to make CEQA Findings and issue a Statement of Overriding Considerations (SOC). In making its concurrence decision, CalRecycle did so, by adopting the LEA's CEQA Findings and Statement of Overriding Considerations.

The comment makes the inaccurate claim that LEA's May 13, 2011 SOC simply reused a prior 2004 SOC that was ordered rescinded by the courts. LEA did not, as the comment asserts, take the position that the earlier SOC remained valid. That SOC was expressly rescinded in response to the January 20, 2006 Writ of Mandate. Rather, the May 13, 2011 SOC was independently considered and adopted by LEA, and clearly demonstrated the balancing of project impacts and benefits based on the current environmental analysis. Some similar project benefits may have been adopted in both the 2004 SOC and the 2011 SOC, but that is because the project benefits have continued validity, not because LEA simply reused the prior SOC without any new consideration of project benefits and impacts.

The comment claims the SOC is defective for not providing substantial evidence within the four corners of the document that it would be infeasible to impose specific mitigation measures. However, CEQA Guidelines Section 15093(b) provides that substantial evidence may come from the final EIR and/or other information in the record, and need not be within the four corners of the SOC. This comment ignores applicable law.

Response to Comment No. 19 through Comment No. 27:

In effect, these comments represent nothing more that the commenter's disagreement with the LEA's determinations regarding the project benefits cited in the SOC. This disagreement does not provide a legal basis for overturning the SOC. All the law requires is substantial evidence for the determinations made in the SOC. And, of this series of comments, only four are based on an asserted lack of substantial evidence.

Comment No. 21 claims there is no evidence to show that waste from North County will actually be disposed of at the landfill. However, this issue was addressed in detail in responses to comments in the 2003 Draft EIR. Response to Comments 2E.354, 3P.011 and 4K.509 indicate the reasons why Gregory Canyon is most likely to receive waste from the immediate North County area. This provided substantial evidence is support of this cited benefit.

Comment No. 22 asserts that there is no evidentiary basis to support the cited benefit of reduced GHG emissions. That is incorrect in two respects. First, LEA reviewed a technical memorandum from Kleinfelder submitted by the applicant, indicating that Gregory Canyon, as a new landfill, would be able to capture and destroy a greater percentage of landfill gas produced when compared to existing landfills where gas collection systems are retrofitted. Compared to solid waste disposed of in an existing landfill, the use of Gregory Canyon would result in the capture of more of the landfill gas produced from that given volume of waste, meaning fewer GHG emissions. Second, Response to Comment 4K.509 and the 2003 Benefits Analysis included a discussion and calculation of the savings in vehicle miles traveled that will result from the use of the landfill for disposal of waste generated in North County. This analysis and conclusion was not challenged in the prior CEQA litigation.

Comment No. 24 claims that the contribution to CalTrans safety improvements cannot be enforced. That claim is incorrect on its face, since the requirement to make that contribution is a condition of the proposed SWFP. As discussed in Response to Comment No. 15 above, LEA recognizes that CalTrans carries out projects on state highways. The applicant made a funding commitment and LEA made that commitment enforceable through the SWFP. The comment fails to acknowledge that

without the project there would not even be the potential for this funding. This provides substantial evidence in support of this cited benefit.

Comment No. 27 claims the project is not consistent with the Draft North County MSCP or the proposed River Park. However, the fact that the landfill site is in a pre-approved mitigation area in the North County MSCP does not prevent its development. What it does mean is that the mitigation measures provided in the EIR are likely to benefit the recovery of species because of habitat restoration undertaken at a location where several threatened or endangered species are known to exist. The issue of habitat fragmentation impacts was addressed in the 2003 Draft EIR, and LEA's determination of no significant habitat fragmentation was upheld by the courts. Finally, the comment fails to disclose that the County's Community Trails Master Plan shows a proposed trail through the landfill property. If the County Parks Department includes a trail at this location as part of its future planning, the potential that the trail would actually be constructed must been viewed as a benefit. Also, a trail through restored habitat is a far more valuable resource to the County than a trail through abandoned dairy operations, and the habitat restoration in this location is a mitigation requirement for the project. This provides substantial evidence for the cited benefit.

Army Corps of Engineers Jurisdictional Determination

On or about July 8, 2011 the U.S. Army Corps of Engineers (ACOE) issued an Approved Jurisdictional Determination for the project site to the project applicant. Neither the LEA nor CalRecycle were copied. When the project applicant received this document, it engaged Bill Magdych, Ph.D. of Bill Magdych Associates to determine how the areas now identified as jurisdictional compared to prior determinations, and how those areas related to areas that would be impacted by the project. Only map-comparisons (using maps from different sources) were feasible because the ACOE data files were not initially provided. The applicant promptly notified LEA as soon as Dr. Magdych reached his conclusions regarding the map comparisons and the effect of the changed determination. Dr. Magdych estimated that the revised ACOE determination of the waters under its jurisdiction reclassified as jurisdictional approximately 0.2 additional acres of area that would be temporarily impacted by bridge construction, above the temporarily impacted acreage within the area the ACOE had previously classified as jurisdictional. The area of permanent impact to waters of the U.S. and waters subject to Clean Water Act Section 401 certification remains at <0.1 acres, as provided in the 2010 Addendum. Dr. Magdych's technical memorandum to the applicant is attached at Tab D.

The applicant received these results and notified the LEA after CalRecycle had concurred in the proposed permit. The CalRecycle record does not indicate that CalRecycle was aware of this document prior to its action, and in any case the overlap between project impact areas and the additional jurisdictional area noted above would not be apparent to a reader without the map-to-map comparisons done by Dr. Magdych.

State law does not provide for a procedure for returning a permit in which CalRecycle has concurred to CalRecycle so that new information can be considered. Staff has nevertheless considered whether to recommend such an action. Our conclusion is that reconsideration could not change CalRecycle's concurrence or otherwise have any substantive impact. We recommend against taking an action that

has no basis in law, and no prospect of doing anything other than delaying the issuance of this permit. A brief explanation of this conclusion follows.

The reclassification as ACOE jurisdictional of an area that will be temporarily impacted by the project does not affect matters within the authority or jurisdiction of CalRecycle or the LEA; rather, it relates to matters within the jurisdiction of the ACOE and the Regional Water Quality Control Board. Re-submitting the matter to CalRecycle could not change CalRecycle's concurrence or otherwise have any substantive impact. This conclusion is compelled by Section 44009 of the Public Resources Code. It is also apparent from statements made by the Acting Director of CalRecycle in his Action concurring in the proposed permit for this facility, and from statements in the CalRecycle Staff Report on the proposed permit that were adopted by the Acting Director in that Action, that CalRecycle would reach the same conclusion.

Section 44009 of the Public Resources Code, with bracketed material included in the CalRecycle Staff Report at footnote 5, provides in pertinent part as follows:

> "(a)(2) If the board determines that the permit is not consistent with the state minimum standards adopted pursuant to Section 43020, or is not consistent with Sections 43040 [financial responsibility for liability arising from operations], 43600 [financial assurances for closure and postclosure maintenance], 44007 [timely notice of the proposed permit to the Department and the applicant], 44010 [conformance with standards adopted by the Department], 44017 [additional requirements for conversion facilities], 44150 [additional requirements for transformation facilities] , and 44152 [additional requirements for transformation facilities] or Division 31 (commencing with Section 50000) [consistency with the county-wide integrated waste management plan], the board shall object to provisions of the permit….(c) The board shall not object to the issuance, modification, or revision of any solid waste facilities permit unless the board finds that the permit is not consistent with the state minimum standards adopted pursuant to Section 43020, or is not consistent with Section 43040, 43600, 44007, 44010, 44017, 44150, or 44152 or Division 31 (commencing with Section 50000)."

The revised jurisdictional determination by the ACOE does not cover, relate to, involve or implicate any of the provisions of the Public Resources Code listed above. The restrictions on CalRecycle's ability to object, as set out in subsection (c) of Section 44009 of the Public Resources Code, would therefore prevent CalRecycle from considering the revised ACOE determination even if you returned the proposed permit to CalRecycle for reconsideration of its concurrence determination.

In addition, the Acting Director of CalRecycle, in discussing another impact from the project, acknowledged that "it is not within the jurisdiction or authority of the Department to object to a proposed permit based upon this issue, and as a Responsible Agency under CEQA, our ability to add mitigations to a permit are limited to those matters within our authority, therefore, it cannot be a basis for my decision in the matter."

The Acting Director Action also stated, "I adopt the findings and determinations set out in the Staff Report and this Request for Action on the grounds stated therein…" The Staff Report addressed the

limitations applicable to CalRecycle's ability to object to proposed permits in detail, including in this passage at page 12:

> "With respect to its consideration of alternatives to the proposed project and the imposition of mitigation measures, a Responsible Agency is more limited than the Lead Agency. As a Responsible Agency, the Department is responsible "for mitigating or avoiding only the direct or indirect environmental effects of those parts of the project which it decides to carry out, finance, or approve." CEQA Guidelines, § 15096(g)(1). The specific aspects of the proposed project that the Department must consider are those requirements set out in Public Resources Code Section 44009 which provide the only grounds on which the Department can object to a proposed permit. As set out in this staff report, the proposed permit satisfies all of those requirements. None of the project's unavoidable significant impacts identified in the FEIR and RFEIR arise from the aspects of the project that the Department is authorized to act on….The Department has no authority to impose mitigation measures to reduce these impacts under its organic law, and CEQA does not convey authority beyond the Department's organic law to address environmental concerns solely within other agencies' jurisdictions. Indeed, the Department is precluded from imposing conditions on the solid waste facilities permit that the LEA has proposed." (Footnotes omitted.)

These circumstances warrant a conclusion by you that resubmittal of the proposed SWFP to CalRecycle for reconsideration of its concurrence decision is not required.

STAFF RECOMMENDATIONS:

1. Find that preparation of a Subsequent or Supplemental EIR is not required in response to the ACOE determination dated July 8, 2011.

2. Find that a Subsequent or Supplemental EIR is not required in response to any of the comments on the proposed permit submitted to CalRecycle, and reaffirm your prior CEQA findings made on May 13, 2011.

3. Review and consider the overriding consideration identified on May 13, 2001 and the significant and unavoidable impacts identified in environmental review documents for this project and the determination of the Acting Director of CalRecycle that this project would have a significant environmental justice impact and determine that the benefits of this project outweigh and override these impacts.

4. Find that the proposed solid waste permit is consistent with Division 30 of the Public Resources Code and regulations adopted by CalRecycle and its predecessor agency pursuant to that division applicable to solid waste facilities.

5. Determine that there are no grounds to ask CalRecycle to reconsider or reaffirm its concurrence determination in response to the ACOE Determination

6. Issue the Solid Waste Facility Permit as proposed to CalRecycle on May 13, 2011.

Tab List:

Tab A -- CalRecycle Staff Report
Tab B – CalRecycle Action Request
Tab C – Bracketed comments of Procopio Cory Hargreaves and Savitch LLP to CalRecycle
Tab D – Magdych Technical Memorandum re Army Corps Determination